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COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION

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AUSTRALIA

[13 January 1999]

* The present document contains additional information pursuant to a request of the Committee in decision 1 (53), adopted on 11 August 1998 (A/53/18, para. 22).

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Preamble

1. On 11 August 1998 the United Nations Committee on the Elimination of Racial Discrimination wrote to the Australian Permanent Representative in Geneva enclosing a copy of Decision 1 (53) adopted by the Committee at its 11 August 1998 meeting.

2. The Committee requested the Government of Australia to provide it with information on the changes recently projected or introduced to the 1993 Native Title Act, on any changes of policy as to Aboriginal land rights, and of the functions of the Aboriginal and Torres Strait [Islander] Social Justice Commissioner.

3. The Committee states that it wishes to consider the compatibility of any such changes with Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

I. INFORMATION ON THE CHANGES RECENTLY PROJECTED OR INTRODUCED TO THE 1993 NATIVE TITLE ACT

4. In July 1998, the Australian Parliament passed the Native Title Amendment Act 1998. It contained amendments to the Native Title Act 1993 (NTA) to deal with a range of issues. The majority of the amendments came into operation in September 1998.

5. The Native Title Act 1993 and the Native Title Amendment Act 1998 were the legislative responses of successive Commonwealth Governments to two landmark High Court decisions: the Mabo decision 1/ in June 1992 and the Wik decision 2/ in December 1996. These two decisions transformed the way in which Australian law regarded the relationship of indigenous people with land. The Mabo decision recognized for the first time that Australia's indigenous people had common law rights flowing from their traditional connection with land. The Wik decision held that these legal rights might exist even in relation to land the subject of a pastoral lease.

6. Both decisions potentially affected every aspect of land and water management in Australia, and associated resource development.

7. While the Committee has available the previous periodic report which discusses the Mabo decision, for completeness this paper briefly summarizes both decisions; outlines the original NTA and its principles; sets out the issues that arose from administrative and legal experience with the NTA; and summarizes the history and intention of the 1998 changes to the NTA.

A. The Mabo decision

8. Native title was first recognized in Australia by the High Court in Mabo in 1992. The majority of the Court held that the common law of Australia recognizes a form of native title existing in accordance with the laws and customs of indigenous people where: those people have maintained their traditional connection with the land; and their title has not been "extinguished" by a legislative or other act of government.

9. From comments made by members of the High Court in the decision, it was understood that the grant of a freehold or leasehold interest in land (including a pastoral lease) had "extinguished" native title, but that the mere reservation of land for later use, or its use specifically as Aboriginal land, had not extinguished native title.

10. The Mabo judgement had wide and complex legal and practical implications. For example, its interaction with the existing Commonwealth Racial Discrimination Act 1975 (that implements Australia's obligations under the Convention on the Elimination of All Forms of Racial Discrimination) raised the possibility that past acts by State and Territory governments over land where native title existed might be invalid.

11. The Government of the day thought it was necessary to protect native title, as the High Court had held that it was vulnerable to extinguishment, and to integrate it into Australian law and land management so that future economic activity and development could proceed.

B. The Native Title Act 1993

12. In its legislative response to the Mabo decision, the Commonwealth Parliament passed the Native Title Act 1993, the most important features of which were:

- The recognition and protection of native title, including the setting up of procedures to enable native title claims to be made to and determined by the National Native Title Tribunal and the Federal Court. A system of Aboriginal and Torres Strait Islander representative bodies was set up and funded by the Commonwealth Government to assist native title holders with the claims process;

- The NTA enables the validation of any State and Territory government acts before 1994 that may have been invalid because of native title. Native title-holders were entitled to compensation for any effect on their rights;

- In relation to all government acts from 1 January 1994 that might affect native title, the creation of a legislative regime under which acts done by governments (that is, the Commonwealth and State and Territory governments) on native title land were regulated. Native title was protected by the "freehold test": generally governments could not do acts on land where native title existed if such acts could not be done over freehold land. In the future, native title could generally only be extinguished in one of two ways: through an agreement between a government and the native title holders, or through a non-discriminatory compulsory acquisition by a government under legislation that complied with certain statutory criteria (compensation on just terms had to be paid for any such compulsory acquisition);

- The NTA also set out the ways in which governments could lawfully deal with land that may be the subject of native title rights and

interests into the future. For example, it allowed governments to renew non-native title interests such as agricultural leases and to confirm existing rights; and

- The creation of a statutory "right to negotiate" for registered native title claimants and determined holders over land where a government proposed to grant a right to mine or compulsorily acquire native title so as to allow a third party to undertake some development. This right was not an absolute veto over development, but gave native title-holders a right to negotiate with governments and developers about the future use of land. States and Territories were able to replace the Commonwealth right to negotiate with their own regimes. 3/

13. The NTA only set out a framework for the management of native title within Australia. It provided a means by which native title could be established in the National Native Title Tribunal and the courts. However, the content of native title and its relationship with non-native title rights and interests were left for the courts to determine in the future. It was assumed at the time that the NTA was passed, however, that native title had been extinguished on freehold land (confirmed by the High Court in September 1998 4/). It was also assumed to have been extinguished on leasehold land, on the basis that the grant of a leasehold interest necessarily involved a grant of exclusive possession.

14. The NTA recognized that land management was essentially a State and Territory (that is, not Commonwealth) responsibility, and that native title would have to be accommodated in State and Territory regimes.

15. It was clear that the then Government accepted in 1993 that the NTA itself was only a first step, and would need revisiting by the Parliament in the future.

16. To summarize, the NTA had four major elements:

- it established a process for the recognition of native title within the Australian legal system;

- it ensured the future protection of native title, since in common law native title was susceptible to extinguishment by inconsistent grants;

- it provided certainty to governments and others in relation to land management activities in the past and in the future; and

- provided a framework for dealing with native title.

17. However, judicial decisions and administrative experience after the enactment of the NTA raised a number of significant issues in relation to its operation.

C. Court cases affecting the operation of the Native Title Act

Pre-Wik cases

18. In 1995 the High Court decision in Brandy 5/ raised constitutional questions about the role of the National Native Title Tribunal, and suggested that it could not make determinations of native title even where all parties agreed.

19. Again in 1995, the Federal Court held in Lane 6/ that native title claims were required to be registered as soon as they had been lodged. Native title claimants therefore had automatic access to the right to negotiate, whether or not their application could satisfy the acceptance test in the NTA. That test had been designed as an initial filter to ensure that claims that were frivolous or vexatious, or that prima facie could not be made out, did not obtain the significant statutory rights that the NTA provided. In 1996 in Waanyi, 7/ the High Court also found that the Native Title Registrar could not refuse to accept a claim if there was a legal doubt about whether native title may or may not exist over the area claimed.

20. This and other factors led to large numbers of overlapping and multiple claims for the same area.

21. In response to the Brandy and Lane decisions in 1995, the then Labor Government introduced a bill into the Australian Parliament that contained amendments to ensure the constitutional validity of the determination process, and to create a new registration test for claims. That bill was not debated before the 1996 federal election was called.

The Wik decision

22. The High Court's Wik decision on 23 December 1996 demonstrated that the assumption that native title had been extinguished by the grant of a lease was wrong, and that native title may still exist on pastoral lease land.

23. In summary, a majority of the High Court held that the grant of particular pastoral leases under Queensland legislation did not confer exclusive possession on the pastoral lessees, and that any native title in relation to that land had not necessarily been extinguished by the grant of those leases. The majority of the Court found that where an inconsistency arises between the rights enjoyed by native title holders and the rights conferred upon the lessee, native title rights must yield to the extent of the inconsistency to the rights of the lessee.

24. The Wik decision gave rise to new issues under the NTA:

- governments had carried on activities after 1 January 1994 on pastoral lease land without complying with NTA procedures on the understanding that there was no native title there; those acts could be invalid if native title existed on that land;

- the recognition that native title could "co-exist" with the interests of other parties in particular land was significant; the NTA as enacted in 1993 provided no mechanism for managing this inter-relationship; and

- where native title was of this co-existing kind, it was clearly not equivalent to full ownership. The "freehold test" as the test of what kinds of acts could be done by governments in the future was not always appropriate.

25. In summary, the original NTA did not adequately take account of the possibility that native title might exist on pastoral leases. It did not therefore adequately address the legal relationship between these co-existing rights. It left both native title holders and pastoralists uncertain of their rights under the NTA.

D. Limitations in the 1993 Act

26. Apart from the effect of these judicial decisions, problems with the administration of the NTA became apparent soon after it came into operation. For indigenous people, the NTA processes were proving lengthy. For example, at the time the Native Title Amendment Bill was being debated in 1998, there were around 700 applications for native title determinations and only two determinations of native title on mainland Australia (at December 1998 there are still only four mainland determinations and one offshore).

27. Of major significance were the deficiencies of the provision in the original NTA that allowed for agreements between native title holders and governments. Where there had not been a determination of native title, there was no certainty that the indigenous parties to any agreement were indeed the native title holders. There was no way to make sure that agreements could be legally binding. Since agreements are an important way of avoiding costly and contentious litigation, and the principle of encouraging agreements was supported by all parties, this was a significant defect in the NTA.

28. Other issues included that the provisions that should have allowed the right to negotiate to be replaced for low impact mining and petroleum exploration titles proved to be almost unworkable. The right to negotiate process itself was the cause of unanticipated delays, in part due to the difficulties dealing with multiple claimants.

29. Indigenous people were not being assisted to the extent originally envisaged by the Aboriginal/Torres Strait representative bodies. These bodies lacked explicit powers and functions, and their accountability regime was not in line with the importance of their intended role.

E. Developing the amendments

30. In summary, by 1997 it had become apparent that the NTA needed to be significantly amended: to put in place an appropriate registration test for native title claims; to resolve the constitutional difficulties arising from the Brandy decision; to give greater recognition to the role of Aboriginal/Torres Strait Islander representative bodies and better specify

their roles and responsibilities; to ensure legal certainty for voluntary negotiated agreements and encourage their use; and deal with the effects of the Wik decision.

31. As part of developing its response to the Wik decision, the Government undertook from early 1997 an extensive consultation phase with all interest groups, including indigenous groups, miners, pastoralists, State and Territory governments and local government. The Prime Minister met with representatives of all groups on a number of occasions in an attempt to develop an agreed legislative response.

32. In May 1997, the Prime Minister released the "10-point plan". It became the basis for a draft bill that was released in June of that year for consultation. An amendment bill was presented to Parliament in 1997 and again in 1998, and the Native Title Amendment Act 1998 was finally passed in July 1998. As part of the parliamentary process, the Government proposed or accepted a significant number of amendments to the bill. For example, the Government proposed amendments to the bill to strengthen the process of notifying native title parties about a range of acts that can be done on native title land (the future act regime). Most of the Native Title Amendment Act commenced on 30 September 1998, with the remainder commencing on 30 October 1998.

F. A summary of the changes to the Native Title Act

1. Changes dealing with non-Wik issues: Brandy issues

33. To overcome the constitutional problems raised by the Brandy case, all applications for determinations of native title and compensation under the NTA are made directly to the Federal Court, rather than the National Native Title Tribunal. 8/ The Tribunal retains, among others, the function of mediating claims where the Federal Court believes this would assist resolve outstanding issues between the parties. 9/ It has been given additional functions of providing assistance to parties to reach agreements, including those concerning the exercise of "statutory access rights" (see below).

2. Registration test

34. The "acceptance test" has been replaced by a new registration test applied by the Native Title Registrar. 10/ Claimants who pass the registration test obtain significant procedural rights under the NTA and:

- can be parties to a right to negotiate process;
- will have the right to be notified and comment about certain activities done by governments, and about mining and compulsory acquisitions to which the right to negotiate does not apply;
- are eligible to exercise statutory access rights; and
- can respond to "non-claimant applications" (where non-native title parties can apply for a determination that native title does not exist).

35. To be registered, claimants must be authorized on behalf of the claimant group; show that prima facie at least some of the native title rights and interests claimed can be established; show that at least one member of the claim group has or had a traditional physical connection with at least part of the land; ensure that any native title rights do not consist of the assertion of the ownership of minerals etc. where the Crown wholly owns them; not claim exclusive rights offshore; and ensure that the native title rights claimed have not been otherwise extinguished.

36. The failure of a claim to pass the registration test does not prevent it from continuing in the Federal Court.

3. Confirmation provisions

37. In response to legal uncertainty in a range of areas, the NTA enables the past extinguishment of native title by the grant of previous exclusive possession tenures to be confirmed by States and Territories. These confirmation provisions seek to reflect the common law, but remove the need for lengthy case-by-case determination by the courts.

38. These grants include freehold and residential, commercial, community purposes and some agricultural leases, and a Schedule of specific types of such leases. The States and Territories are allowed to confirm extinguishment on these exclusive possession tenures in their jurisdiction, in particular those that are set out in the Schedule to the NTA. 11/ Just terms compensation is assured should it be the case that there was in fact no prior common law extinguishment on any of these tenures. 12/

39. Applications for native title cannot be registered over these tenures. However, only a small percentage of the total area of Australia is potentially affected by the confirmation regime - it is estimated that the Schedule of leases represents about 7.7 per cent of Australia, with freehold representing about another 12.8 per cent. This leaves around 79 per cent of Australia that is potentially claimable where traditional connection with the land can still be established.

40. An amendment to the bill took account of the views of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund. The Committee recommended that the Government should deal sensitively with those situations where indigenous people continue to live on reserves and are unable to register native title applications. Accordingly, the Government proposed amendments that allow native title claimants in occupation of land the subject of a land rights type grant or held on trust for indigenous people, to overcome the effect of past extinguishment by any historical act and have their claim determined. 13/ Further land over which native title has been extinguished, even where that extinguishment had been confirmed, can be claimed where it has reverted to vacant Crown land. 14/

4. Agreements

41. A comprehensive and legally effective agreements process is included, based on a system of registration of "indigenous land use agreements" 15/ The resources industry and indigenous communities have been increasingly

interested in negotiating agreements, and there is wide support for these provisions. These agreements can cover any matters relating to native title including for instance, compensation; procedural rights that are to apply instead of the right to negotiate or other procedures under the NTA; the manner of exercise of native title and non-native title rights in an area, for example, on a pastoral lease; and the surrender of native title. They can also allow acts to be done that would otherwise not be possible under the NTA, such as the granting of a non-exclusive lease on vacant Crown land and, where State or Territory legislation allows it, they can also validate acts that have been done invalidly, or that may be done invalidly in the future.

5. Rights of governments

42. The amendments also clarify the rights of governments to authorize the use and management of water; to provide facilities for services to the public; and to implement past reservations of land for a particular purpose. 16/ Native title holders must in many cases be given an opportunity to comment on the proposed activity, and compensation is payable by the government for any effect on native title.

6. Alternative regimes

43. There is an increased ability for native title claims processes to be managed within State and Territory land systems. Provided criteria set out in the Act to ensure independence and appropriate resourcing are met, State and Territory tribunals can undertake National Native Title Tribunal and Native Title Registrar functions (including applying the registration test). While set up under the law of the relevant jurisdiction, these tribunals will be applying NTA provisions in such cases. 17/

7. Relationship with the Racial Discrimination Act 1975

44. New section 7 inserted by the Native Title Amendment Act 1998 provides that the NTA is intended to be read and construed subject to the provisions of the Racial Discrimination Act 1975 (the RDA, that implements Australia's obligations under CERD). The new section reflects the position under the original section 7 of the NTA, namely, that nothing in the NTA affects the operation of the RDA. This means that the RDA will apply to the performance of functions and the exercise of powers conferred or authorized by the NTA. Ambiguous provisions in the NTA should be construed consistently with the RDA.

8. Compulsory acquisitions

45. Generally, in the future native title will only be able to be extinguished by agreement with the native title holders or by a non-discriminatory acquisition process. The amended NTA maintains and indeed strengthens the provisions in relation to compulsory acquisition of native title. The relevant provisions are as follows:

- native title can be compulsorily acquired and thereby extinguished by governments only where freehold title can be compulsorily acquired;

- native title can only be compulsorily acquired and extinguished if the law under which the acquisition takes place permits both compulsory acquisition of native title rights and non-native title rights;

- native title can only be compulsorily acquired and extinguished if in the particular case the native title rights and non-native title rights are acquired;

- native title can only be compulsorily acquired and extinguished if the practices and procedures adopted in acquiring the native title rights and interests are not such as to cause the native title-holder any greater disadvantage than is caused to the holder of non-native title rights and interests when their rights and interests are acquired; and

- just-terms compensation is assured, plus an ability by the native title-holders to request non-monetary compensation and a requirement that there be negotiation in good faith on this issue. 18/

46. This is a strengthened non-discriminatory regime. It gives native title-holders the same protections as freeholders, and some additional protections. Significant specific procedural rights are provided to native title-holders in relation to the compulsory acquisition for third parties for an infrastructure facility, and the right to negotiate or appropriate State or Territory regimes are available for other compulsory acquisitions for third parties. The policy of the Government is that there will be in the future legitimate land management needs for native title and non-native title land, such as suburban developments, public infrastructure and agricultural developments. At the same time, it provides significant rights to native title-holders in relation to those legitimate government activities.

9. Amendments relating to the Wik decision

47. The most important of the amendments in relation to the Wik decision are as follows:

(a) Validation provisions

48. States and Territories can validate acts done in the period 1 January 1994 to the date of the Wik decision, but only where those acts were done on current or former leasehold or freehold land. 19/ The validation provisions are similar to those contained in the original Act but are not as wide-ranging. Amendments made to the bill in 1998 ensure that native title-holders and representative bodies are required to be notified of mining grants that may be affected by the validation provisions.

(b) Primary production activities

49. The amendments also expressly confirm that pastoralists can lawfully carry on activities under their pastoral lease notwithstanding that native

title may co-exist and, in line with what the High Court found in Wik, that the exercise of pastoral rights "prevail" over the exercise of native title rights on pastoral lease land. 20/

50. In addition, governments are not prevented under the NTA from authorizing the carrying on of other primary production activities on pastoral lease land. State and Territory land management and environmental regulatory regimes will continue to apply as they did before Mabo, the NTA and Wik. The amendments ensure that the States and Territories retain the capacity to manage those issues, notwithstanding that native title may exist on pastoral lease land.

51. These primary production provisions cannot be used to extinguish native title. Under the amendments the only way in which native title can be extinguished on a pastoral lease is by agreement with the native title-holders, or by its acquisition by government under non-discriminatory acquisition legislation. In some jurisdictions, acquisitions can only be made for "public purposes".

52. The NTA also allows governments to continue to grant off-farm grazing and irrigation rights, and to provide for the removal of some resources from pastoral lease lands, but with procedural rights and compensation to native title-holders. 21/

(c) The right to negotiate

53. The right to negotiate process is a unique statutory right. It has been streamlined, its application in some circumstances has been removed and the ability of States and Territories to implement their own appropriate regimes has been increased.

54. Where the right to negotiate has been reworked, native title-holders must still have the same rights as freeholders, and, in particular, the right to be notified, to be consulted, to object and be heard by an independent body. 22/

55. States and Territories are given additional abilities to replace the full Commonwealth right to negotiate with their own regimes on pastoral lease land and other land where native title is only a co-existing right. 23/ States and Territories are also able to replace the right to negotiate for low impact mining grants such as exploration, prospecting and fossicking, for alluvial gold and tin mining, and opal and gem mining with alternative procedural rights. 24/

56. Significant conditions are set out in the amended NTA that must be satisfied before the Commonwealth will approve any State/Territory regimes. In some cases, such conditions include the existence of legislation for the protection of sites of significance to indigenous people. 25/

(d) Statutory access rights

57. In response to the Wik decision, concern was expressed by some indigenous groups that pastoral lessees may attempt to prevent native title

claimants who have regularly had access to the lessee's land for the purpose of conducting traditional activities from continuing that access. Conversely, some pastoralists were concerned that native title claimants who had not previously had access to pastoral leases would attempt to do so, notwithstanding that they had a weak claim.

58. The amendments guarantee that registered native title claimants can continue to have existing access to pastoral lease land while waiting determination a claim for native title - this is to protect registered claimants so that they cannot be denied long-standing access as a possible means of weakening their native title claim. 26/

G. The compliance of the amendments with the principles of the Native Title Act

59. At the beginning of the paper, four basic principles were described on which the original NTA was formulated. The summary below considers the amendments to the NTA against those principles to show their compliance with the fundamentals of the original NTA.

(i) Recognition of native title. The NTA continues to recognize and protect native title. 27/ Under the amendments, a process for recognition remains, but claims are commenced in the Federal Court rather than the National Native Title Tribunal. However, the National Native Title Tribunal maintains a role in mediation, and there is a more legally certain agreements process that can facilitate recognition. While the States and Territories are able more easily to use their own tribunals rather than the National Native Title Tribunal, they must meet the NTA criteria of independence and sufficient resources 28/ and most importantly, operate directly under the Commonwealth NTA, not State and Territory law. This ensures a nationally consistent system.

(ii) Protection of native title. It is still the case that native title can generally only be extinguished under the NTA through agreement with native title-holders or by means of non-discriminatory compulsory acquisition process. In almost all other cases the non-extinguishment principle applies. The "freehold test" is retained in many circumstances; that is, native title is awarded the same protection as freehold, the highest form of land title in Australian law. The NTA recognizes and protects potentially co-existing native title on pastoral leases, which represent over 40 per cent of Australia's land mass. Where the right to negotiate is revised or replaced, significant procedural rights must be awarded to native title-holders and registered claimants. Generally, there must be consultation about ways of minimizing the impact of mining and acquisition on native title, and access to an independent body.

(iii) Legal certainty for governments and third parties. States and Territories are able to validate certain acts done in the period prior to the Wik decision. Governmental functions are also assured provided that the specified procedures are followed.

(iv) The NTA as a framework. While the position of exclusive possession tenures has now been put beyond doubt in the interests of certainty, the content of native title and its inter-relationship with non-native title interests will still largely be a matter for future judicial consideration.

H. The Indigenous Land Fund

60. The Aboriginal and Torres Strait Islander Land Fund (Land Fund) was established in 1994 as part of the Government's response to the Mabo decision. Its purpose was to assist indigenous people to purchase land in recognition that many native title rights had already been extinguished.

61. The Government is committed to continued support for the operation of the Land Fund and the role of the Indigenous Land Corporation (ILC) which seeks to assist indigenous people to acquire and manage land in a sustainable way.

62. The Land Fund was established with an initial allocation of $A 200 million in 1994-95 and subsequent allocations of $A 121 million per year (indexed). This will provide a guaranteed capital base of $A 1.3 billion, and continued funding for the ILC for land purchase. In 1998-99 the Fund will provide $A 50 million to the ILC for land purchases. The ILC has set a priority for its first five years of operation on restoring land of cultural significance to indigenous people.

63. In addition to the funding of the Land Fund, the Government expects to have spent a total of $A 268 million on native title in the period 1996-97 to 1999-2000, made up as follows:

- native title claims assistance (funding to representative bodies): $A 168 million ;
- national Native Title Tribunal: $A 83 million; and
- native title cost sharing with the States and Territories: $A 17 million.

64. Fifteen per cent of the Australian continent is now Aboriginal-owned or -controlled.

65. In summary, the amended Native Title Act provides the following benefits to native title-holders:

- respects the common law and implements the Mabo decision;

- recognizes and protects native title so that it can still be claimed, in line with the Wik decision, over 79 per cent of Australia;

- makes proper provision for co-existing native title on pastoral lease land;

- guarantees registered native title claimants' existing access to pastoral land pending a native title determination;

- provides a clearer claims process and deals with the overlapping and multiple claims that are dividing Aboriginal communities;

- recognizes and strengthens the role of native title representative bodies to facilitate the recognition and protection of native title;

- enables the legal certainty of agreements that are essential for co-existence; and

- the Government has maintained the Land Fund to enable the purchase of land where native title has been extinguished.

II. POLICY ON ABORIGINAL LAND RIGHTS

A. Summary of indigenous land rights in Australia

66. Most Australian States and Territories have some form of legislation relating to the provision of access, and granting of land, to indigenous peoples. Commonwealth land rights legislation seeks to recognize and provide for Aboriginal people and Torres Strait Islander rights and needs in relation to land. The Commonwealth legislation includes the Aboriginal Land Rights (Northern Territory) Act 1976 (the ALRA), the Aboriginal Land Grant (Jervis Bay Territory) Act 1986 and the Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987. These Acts provide for land rights in the Northern Territory, the Jervis Bay Territory, and the Lake Condah and Framlingham Forest regions in Victoria respectively. In December 1995, the Jervis Bay National Park and Botanic Gardens were handed back to the Aboriginal Community Council. In Victoria, the legislation provides for the grant of some land in Victoria to Aboriginal people.

67. The ALRA makes provision for the granting of inalienable freehold title with exclusive rights of possession and access to land in the Northern Territory to Aboriginal Land Trusts. Since the commencement of the Act almost half of the land in the Northern Territory has been granted to Aboriginal Land Trusts as a result of land claims.

B. Review of the Aboriginal Land Rights Act

68. The ALRA has not been the subject of a major review since 1983. The Government has previously announced that it will maintain the current right of

Aboriginal people to consent to mineral exploration on land held by them. On 16 July 1997, the Minister for Aboriginal and Torres Strait Islander Affairs, Senator John Herron, announced a review of the ALRA, and in October 1997 Mr. John Reeves, QC, was appointed to undertake the review.

69. After an extensive consultation process, which included consultation with Aboriginal people, the report "Building on Land Rights for the Next Generation: Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976" was presented to the Minister for Aboriginal and Torres Strait Islander Affairs on 20 August 1998. The report is wide-ranging and makes recommendations for substantial changes to the ALRA.

70. The Government referred the Reeves Report to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs in December 1998. Referral of the report to the Standing Committee provides an opportunity for ascertaining the views of those with an interest in the recommendations of the report. The Government will develop its response to the Reeves Report in the context of responding to the Standing Committee's report.

III. FUNCTIONS OF THE ABORIGINAL AND TORRES STRAIT ISLANDER SOCIAL JUSTICE COMMISSIONER

71. The Aboriginal and Torres Strait Islander Social Justice Commissioner (the Social Justice Commissioner) is a member of the Human Rights and Equal Opportunity Commission (the Commission). The Commission is an independent authority established under Commonwealth legislation. Its functions include handling complaints of discrimination under Commonwealth anti-discrimination legislation (including the Racial Discrimination Act 1975), the promotion of awareness of human rights and the education of the community about human rights. The Social Justice Commissioner is appointed under the provisions of the Human Rights and Equal Opportunity Commission Act 1986. The position of Aboriginal and Torres Strait Islander Social Justice Commissioner was created as a result of the findings of the Royal Commission into Aboriginal Deaths in Custody and the National Inquiry into Racist Violence. The position was created in 1992.

A. The functions of the Social Justice Commissioner

72. The Social Justice Commissioner's principal functions and responsibilities are set out in section 46C of the Human Rights and Equal Opportunity Commission Act 1986. These have remained unchanged since the position was created in 1992. The principal functions include:

(a) To submit a report to the Minister, as soon as practicable after 30 June in each year, regarding the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders, and including recommendations as to the action that should be taken to ensure the enjoyment and exercise of human rights by those persons;

(b) To promote discussion and awareness of human rights in relation to Aboriginal persons and Torres Strait Islanders;

(c) To undertake research and educational programmes, and other programmes, for the purpose of promoting respect for the human rights of Aboriginal persons and Torres Strait Islanders and promoting the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders;

(d) To examine enactments, and proposed enactments, for the purpose of ascertaining whether they recognize and protect the human rights of Aboriginal persons and Torres Strait Islanders, and to report to the Minister the results of any such examination.

73. The Social Justice Commissioner was given additional functions in 1993. Section 209 of the Native Title Act 1993 provides that:

> "(1) As soon as practicable after 30 June in each year, the Aboriginal and Torres Strait Islander Social Justice Commissioner (appointed under the Human Rights and Equal Opportunity Commission Act 1986) must prepare and submit to the Commonwealth Minister a report on:
>
> (a) the operation of this Act; and
>
> (b) the effect of this Act on the exercise and enjoyment of human rights of Aboriginal peoples and Torres Strait Islanders.
>
> (2) The Commonwealth Minister may at any time, by written notice, direct the Commissioner to report to the Commonwealth Minister on any matter covered by paragraph (1) (a) or (b)."

B. Proposed restructuring of the Commission

74. The Commonwealth Government is proposing to restructure the Commission. Legislation that would have implemented these changes lapsed on the calling of the Federal election in August 1998. It is the Government's intention to reintroduce the legislation into Parliament as soon as possible.

75. The legislation provides for the refocusing of the Commission's functions, in order to give greater priority to education, dissemination of information on human rights and assistance to business and the general community.

76. The Commission's new structure, which is aimed at enabling the Commission to work in a more streamlined, cooperative and cohesive manner, and to make better and more efficient use of its resources, will provide for three deputy presidents to replace the five current special-purpose Commissioners. In addition to the position of Social Justice Commissioner, these current special-purpose Commissioners are the Race Discrimination Commissioner, the Sex Discrimination Commissioner, the Disability Commissioner and the Human Rights Commissioner.

77. Under the proposed new structure, one deputy president will be assigned general responsibility for sex discrimination and equal opportunity matters; one will be assigned human rights and disability discrimination; and one will have responsibility for matters concerning Aboriginal and Torres Strait Islander social justice and race discrimination.

78. This proposed restructuring of the Commission will not change in any way the functions of the Commission in relation to the enjoyment and exercise of human rights by Aboriginal people and Torres Strait Islanders. All those functions listed above will continue to be performed. However, because there will no longer be a specific Aboriginal and Torres Strait Islander Social Justice Commissioner, the functions will be performed by the Commission as a whole. It will be a matter for the Commission to delegate responsibility for the performance of these functions to the relevant deputy president.

Notes

1/ Mabo v. Queensland (No. 2) (1992) 175 CLR 1 ("Mabo").

2/ Wik Peoples v. Queensland (1996) 187 CLR 1 ("Wik").

3/ Section 43 of the NTA.

4/ Fejo and Another on behalf of the Larrakia People v. Northern Territory (1998) 156 ALR 721.

5/ Brandy v. Human Rights and Equal Opportunity Commission (1995) 183 CLR 245.

6/ Northern Territory v. Lane (1995) 138 ALR 544.

7/ North Ganalanja Aboriginal Corporation v. Queensland (1996) 185 CLR 595.

8/ Section 61.

9/ Section 86B.

10/ Sections 190A, 190B, 190C, and 190D.

11/ Section 23E.

12/ Section 23J.

13/ Section 47A.

14/ Section 47B.

15/ Division 3, Subdivisions B, C, D, and E.

16/ Sections 24HA, 24KA, and 24JA respectively.

17/ Section 207B.

18/ Section 24MD.

19/ Section 22F, and section 22A in relation to Commonwealth acts.

20/ Sections 24GA, 24GB, and 24GC.

21/ Sections 24GD, and 24GE.

22/ Subsections 24MD(6A) and (6B).

23/ Section 43A.

24/ Sections 26A, 26B, and 26C, respectively.

25/ For example, subsection 43A(7).

26/ Division 3, Subdivision Q.

27/ Section 10.

28/ Subsection 207B(4).